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IN THE

Supreme Court of the United States

October Term, 1968

No. 1202

SPEYER INC. and YELLOW CAB COMPANY OF ERIE,
Petitioners,

v.

HUMBLE OIL & REFINING COMPANY and
A. O. SMITH CORPORATION,
Respondents.

BRIEF OF A. O. SMITH CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RAYMOND G. HASLEY,
ROGER CURRAN,
ROSE, SCHMIDT AND DIXON,
Attorneys for Respondent,
A. O. Smith Corp.

9th Floor, Oliver Building,
Pittsburgh, Pennsylvania 15222.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
5022 CARLYN DRIVE, PITTSBURGH, PA., 15236,
412-881-7463.

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Counter-Statement of the Case.

Respondent A. O. Smith Corporation incorporates herein and adopts the statement of the case set out in the comprehensive opinion in the United States District Court for the Western District of Pennsylvania in this case reported at 275 F. Supp. 861 (W. D. Pa. 1967) (A. 22-41), and the statement of the case in the opinion of the United States Court of Appeals for the Third Circuit reported at 403 F. 2d 766 (3rd Cir. 1968) (A. 42-52). Hence, Respondent A. O. Smith will make no Statement of the Case beyond

what is necessary to correct certain gross inaccuracies in the Statement of the Case in the Petition for a Writ of Certiorari.

The gasoline dispensing unit or pump involved in this case was alleged to have been manufactured and sold by Erie Meter Systems, Inc., a dissolved corporation (R. 30a, 35a), the assets of which were purchased by Respondent A. O. Smith in 1958.* With reference to this dispensing unit, it is stated at page 6 of the Petition:

> "The pump had no safety valve to relieve pressure coming from the hose end of the pump. The relief valves in the pump itself were not capable of relieving the pressures exerted in the system with the use of the Goodyear Flexsteel hose, although the hose was admittedly an integral part of the dispensing unit without which it could not function. . . . It was concluded by experts for all the parties that the casting was ruptured by the internal pressure, and that the valves on the pump could not, and did not, relieve the pressure."

Petitioners' own proof in the case categorically contradicts this allegation. Mr. Crankshaw, Petitioners' chief expert in the District Court, testified at the trial that in his opinion absent faulty maintenance (which cannot be charged to A. O. Smith since it was not responsible for maintaining the dispensing unit), the pressure relief system in this unit was sufficient to prevent any foreseeable failure from internal pressure (R. 532a-533a). The District Court, sitting without a jury, after hearing the entire testimony, agreed and concluded:

> "It is apparent that Erie was extremely conservative in the design and construction of its pumping unit,

* It should be pointed out that at the trial of this case A. O. Smith Corporation strongly resisted the allegation that it was responsible for any alleged negligence of Erie Meter Systems, Inc. This matter was not decided by the trial court in view of its decision on the merits (A. 34).

and hence cannot be found liable in this regard." (A. 35)

The Court of Appeals refused to set aside the findings of fact made by the trial judge, and quite correctly pointed out that Petitioners took the position that the pressure relief system was perfectly adequate:

> "Plaintiffs now assert an alternative argument: that defendants were negligent in installing the flexsteel hose because it was foreseeable that certain uses of this hose would cause an extraordinary internal pressure which would fracture the meter casting. They argue that both defendants were chargeable with such knowledge, and hence were negligent in not rectifying the condition or issuing a warning about it. The argument is ingenious when viewed in the context of the history of this case. This theory was not advanced by plaintiffs in their pretrial statements nor in their case-in-chief; moreover, the thrust of their own expert testimony was that the flexsteel hose could not have created the rupture in the casting. The examination of plaintiffs' expert Crankshaw (Appendix, page 657a) reveals:
>
> 'Q. Is it your testimony, then, that if the high pressure relief valve was clean, that the jerking of the hose on the morning of April 29, 1964, could not have ruptured the cover of the meter?
>
> A. I think that is correct.'
>
> *Apart from this patently inconsistent position of plaintiffs, the testimony indicated that the Underwriters Laboratories, the recognized testing agency in the trade, had placed its stamp of approval on the use of the flexsteel hose with gasoline pumps and that the hose was in general use in the trade.*" (Emphasis supplied) (A. 47-48).

Another grossly misleading statement appears in Petitioners' Statement of the Case at page 6 of the Petition:

> "Although Goodyear Flexsteel hose had been on the market for attachment to gasoline pumps of this type

> since the late 1950's, Erie Meter Systems and its successor, A. O. Smith Corporation, had made no attempt to conduct tests with this type of hose, nor to install fail-safe devices on their units, nor to warn users and prior purchasers thereof as to the dangers inherent in this combination."

No such duty exists in the law and this allegation was rejected out of hand by the trial judge with the following remark:

> "As for liability predicated upon the failure of Erie, or A. O. Smith, to foresee the danger attendant upon the use of the Flexsteel hose, it is sufficient to state that such a duty is unreasonable and far-fetched. It must be noted that the type of pump has been on the market for several years without complaints, and that it and its components as well as the hose had been approved by the major independent testing laboratory. To require a manufacturer of a product which has been demonstrably safe, to consider and test every conceivable attachment which might be used in conjunction with that product, especially when the attachment had already been tested and certified by an independent agency, is unreasonably burdensome and is not required by law" (A. 35).

In this same connection, the Court of Appeals held:

> "The test is one of foreseeability. The trial judge concluded that Humble could not reasonably have foreseen such characteristics and consequences; to reverse that conclusion would be tantamount to a declaration that it was foreseeable as a matter of law. This we cannot do. To hold that the defendants should have known in 1964 the idiosyncrosies of the flexsteel hose which were not discovered by experts until 1967, is to ignore the realities of the case, namely, that the flexsteel hose was not a component of the pump as originally manufactured that its use was initiated over nine years after the meter was sold and installed, that the defendants were neither manufacturers nor dealers in hoses, that the flexsteel hose had received the approval

> of the Underwriters Laboratories, and that it was in general use in the trade. The Supreme Court's observation in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239 (1943) is apropos: 'Events too remote to require reasonable prevision need not be anticipated.' 320 U. S. at 483, 64 S. Ct. at 236'' (A. 48-49).

Other errors in the Statement of the Case in Petitioners' Petition for a Writ of Certiorari have been fully and adequately discussed in the Brief in Opposition filed by Respondent Humble Oil & Refining Company and will not be repeated here.

Reasons in Opposition to the Issuance of a Writ of Certiorari.

The pretrial procedure in this case followed the usual and accepted course in non-jury proceedings, was fully agreed to by petitioners, and was not prejudicial in any way.

Reasons I and II for Granting the Writ in the Petition for a Writ of Certiorari relate only to Respondent Humble Oil & Refining Company and, therefore, will not be discussed in this brief. A full and adequate discussion of these matters is presented in the brief filed by Respondent Humble.

Petitioners' Reason III entitled ''Unfair Result of Pretrial Procedures'' questions the pretrial procedure. Petitioners allege that the pretrial procedures adopted in this case resulted in giving the respondents an unfair advantage and distorted the pretrial procedures prescribed by Fed. R. Civ. P. 16 and Rule 5 of the Rules of the United States District Court for the Western District of Pennsylvania. Specifically, Petitioners object to the times at

which Pretrial Narrative Statements were filed and to an intermission between the presentation of plaintiffs' and defendants' evidence.

Rule 5 II (b) of the District Court Rules provides:

> "Non-Jury cases shall be pretried in accordance with an Order by the Judge to whom the case has been assigned."

This case was pretried solely in accordance with pretrial orders issued by the Judge to whom the case was assigned and the procedure fully complied with the requirements of Rule 5.

The record discloses that at no time did Petitioners formally object to the pretrial procedure, or to any pretrial orders issued by the Court. Plaintiffs fully consented both to the pretrial and to the trial procedure used, after full consultation with the Court and with full knowledge of the circumstances. Moreover, the pretrial procedure in this case was discussed informally with the trial judge by counsel for all the parties on numerous occasions during the presentation of motions relating to discovery and summary judgment. At these conferences counsel reported on the progress of their preparation for trial and discussed with the Court the times within which pretrial requirements should be accomplished and the case set for trial. Counsel for Petitioners participated fully in these discussions.

In addition, the issue of the fairness of the pretrial procedure was not argued in the District Court or in the Court of Appeals and is therefore waived for purposes of appeal to this Court.

With regard to the allegation at page 16 of the Petition that the Pretrial Narrative Statement of A. O. Smith was

not filed until May 5, 1967, it should be pointed out that Petitioners did not object to the date of filing nor to the time at which the reports of experts of Respondent A. O. Smith were furnished to Petitioners.

Certain facts set out by Petitioners in Argument III are patently incorrect. At page 16 of the Petition, it is stated that A. O. Smith did not file its Pretrial Narrative Statement, "including a list of twenty-four witnesses (R. 89a) until May 5, 1967". A reference to page 89a of the Appendix shows that this is clearly incorrect. The Pretrial Narrative Statement of A. O. Smith Corporation contained the names of *nine* witnesses (R. 18b-21b).

Even though Petitioners now allege that they were not given the opportunity to review the reports and tests of Respondents' experts to determine the validity of the tests performed by Respondents' experts and to prepare effective rebuttal, the fact is that in their post-trial argument before the District Court and in their brief and argument in the Court of Appeals, Petitioners adopted the position of Respondents' experts, and categorically rejected the position of their own experts. Hence, they were in no way prejudiced by an alleged lack of opportunity to review the reports and tests and prepare effective rebuttal to the testimony of Respondents' experts.

In any case, it is quite clear from a review of the testimony that Respondents' experts were subjected to a full and vigorous cross examination and Petitioners presented rebuttal testimony after their experts had had more than two weeks to analyze Respondents' theory of the accident.

Finally, Petitioners complain that the intermission between the presentation of plaintiffs' evidence and of defendants' evidence, a period of a little over one month, was

prejudicial to their case. Petitioners comment at page 20 of the Petition:

> "Judges' memories are no more infallible than jurors' memories."

Petitioners then cite a *jury* case, *Carl D. Citron v. Aro Corporation,* 377 F. 2d 750 (3rd Cir. 1967) in which several delays were held to be prejudicial. This, however, is a non-jury case. A daily transcript was made of the proceedings. The entire trial testimony was transcribed and made available to the trial court to review in arriving at the decision. All parties were given the opportunity to file lengthy post-trial briefs and did so. The case was argued on September 11, 1967 and not decided until October 19, 1967. Therefore, the trial court in making its decision had the benefit of the complete trial transcript, of briefs filed by the parties, of oral argument, and the benefit of five months from the conclusion of the trial to review the testimony.

In these circumstances, it is submitted that Petitioners were not prejudiced in any way by the pause between the presentation of plaintiffs' case and the presentation of defendants' case.

In summary, until now Petitioners have never objected to the manner in which the pretrial procedure was handled and never at any time objected to the manner in which A. O. Smith Corporation fulfilled its pretrial requirements. In addition, it is clear from the record that Petitioners were not prejudiced by an intermission in the trial.

Conclusion

For the foregoing reasons, respondent A. O. Smith Corporation requests that the Petition for a Writ of Certiorari be dismissed.

Respectfully submitted,

RAYM' ND G. HASLEY,
ROGER CURRAN,
ROSE, SCHMIDT AND DIXON,
Counsel for Respondent,
A. O. Smith Corporation,
9th Floor, Oliver Building,
Pittsburgh, Pennsylvania 15222.